RASIAH MUNUSAMY

v.

LIM TAN & SONS SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
MOHD. AZMI FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 132 OF 1983]
6 MARCH 1985

CONTRACT: *Sale and purchase agreement for double-storey house - Oral agreement - Whether void and unenforceable by reason of r. 12(1) of Housing Developers Rules 1970 - Dispute of extra land - Purchaser refused to pay the balance demanded by vendor - Whether contract repudiated by purchaser - Whether a deliberate breach will entitle the innocent party to treat himself as discharged.*

This is an appeal against the decision of the High Court wherein the appellant's claim for specific performance, damages and other ancillary reliefs in respect of a contract of sale of a double-storey terrace building was dismissed with costs. The appellant/purchaser alleged that the respondent/vendor orally agreed to sell and transfer to the purchaser the said house to be built on a corner lot. The purchaser also alleged that the sale included extra land. The vendor denied the claim on extra land. The extra land dispute was the main reason for the purchaser refusing to pay the vendor the final balance of RM5,928 despite repeated written demands by the vendor.

The vendor took the stand that the agreement had been repudiated on the ground of the purchaser's refusal to settle the balance sum towards a purchase price after a reasonable time had been given. The vendor also averred that the purchase was based on an oral agreement and therefore void by reason of r. 12(1) of the Housing Developers Rules 1970 ("the 1970 Rules") which provides that every contract of sale "shall be in writing".

Held:

[1] Specific performance allowed without any compensation under s. 18 of the Specific Relief Act 1950.

[2] The law on the validity and enforceability of the oral agreement under the Housing Developers legislation is that although no action can arise from a prohibited and illegal act, if a plaintiff can show that he is a member of the class for whose protection the statutory prohibition was imposed, then as an exception such a person can enforce rights or recover property transferred under the illegal transaction. Although the oral agreement does not comply with the provision of r. 12(1) of the 1970 Rules, the purchaser clearly belongs to a class for whose protection the statutory prohibition is imposed and as such the purchaser can enforce his right for specific performance of the oral contract of sale provided he is a *bona fide* purchaser.

[3] The responsibility of having the contract in writing lies on the vendor as licensed housing developer. This is clear from rr. 12(1) and 17 of the 1970 Rules. It is for the vendor to insist on the written agreement. The fact that the idea of having no written agreement had originated from the purchaser for whatever reason would not make the purchaser a *mala fide* buyer.

[Appeal allowed with costs. Order of learned Judge set aside. Cross-appeal dismissed.]

Cases referred to:
Suisse Atlantique Societe v. N.V. Rotterdamsche Kolen Centrale [1967] 1 AC 361
Freeth v. Burr [1874[LR 9 CP 208
Oversea-Chinese Banking Corporation Ltd. v. Philip Wee Kee Puan [1984] 2 MLJ 1; [1984] 1 CLJ (Rep) 25
Wilsons and Clyde Coal Co. Ltd. v. English [1937] 3 All ER 628
Nash v. Halifax Building Society [1979] 1 Ch 584
Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck [1981] 1 MLJ 56
S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo [1982] 2 MLJ 31; [1982] CLJ (Rep) 305
James McCormick v. William Grogan [1869] 4 LR HL 82

Legislation referred to:
Building Socities Act 1962 [UK], s. 32(1)
Housing Developers (Control and Licensing) Rules 1970, rr. 12(1), 17
Specific Relief Act 1950, s. 18, 34(1)(c)

Other sources referred to:
Chitty on Contracts, 25th Edn., Vol. 1, para. 1602, p. 884
Spry on Equitable Remedies, 2nd Edn., at p. 236

For the appellant - V.K. Palasuntharam; M/s. V.K. Palasuntharam
For the respondent - G. Sri Ram; M/s. Yeo & Yeo

JUDGMENT

Mohd. Azmi FJ:

This is an appeal against the decision of the High Court at Kuala Lumpur wherein the appellant's claim for specific performance, damages and other ancillary reliefs in respect of a contract of sale of a double-storey terrace building at Rawang was dismissed with costs. By para. 4 of the Statement of Claim and admitted by para. 1 of the Amended Defence, the purchaser (appellant/plaintiff) alleged that:

> On 16 December 1971 the defendant (respondent/vendor) acting by one Lim Tan orally agreed with the plaintiff at the defendant's office at No. 54, Jalan Maxwell, Rawang, that the defendant would sell and transfer to the plaintiff lot No. 3227/67, Main Road, Green Park, Rawang, together with a double-storey terrace building which the defendant undertook to build on it. The said lot is a corner lot and the said building would be the building at one end of a row of more than four buildings. The said building is housing accommodation under Housing Developers (Control and Licensing) Act 1966 and the said lot No. 3227/67 is land under Housing Developers (Control and Licensing) Rules 1970.

It was also pleaded by the purchaser that the price of the property was RM28,000 but being a corner lot there was extra land measuring 22' x 70' for which he had to pay an additional RM2,000, thus making a total sum of RM30,000 as consideration for the contract of sale. The vendor denied the claim on extra land. Whilst admitting the purchase price to be RM30,000, the vendor averred that the price included a sum of RM1,500 being the cost of extra work on a balcony and not the cost of extra land. On the evidence, it would appear that the extra land dispute was the main reason for the purchaser refusing to pay the vendor the final balance of RM5,928 (which included RM120 for water deposit) despite repeated written demands by the vendor. From Exhibit AB8 at p. 210 of Appeal Record, it was not disputed that the total sum demanded by the vendor was RM30,120 and out of this the purchaser had paid to the vendor RM24,192 - the last payment of RM19,192 being paid on 25 January 1973 through the Government Housing Loan Division of the Treasury. Being an officer in the Immigration Department at the material time, the purchaser was eligible for a housing loan, and when the sale agreement was entered into it was understood that a loan

of RM20,000 would be sought from the Government towards the purchase of the property. As is normal in such a loan application, the vendor furnished the purchaser with the necessary supporting documents required by the Housing Loan Department to establish the purchase. In the present case there was conflicting evidence as to what documents were in fact furnished by the vendor to the purchaser, but the dispute on documents was more for the purpose of determining by documentary evidence the extra land issue. To cut the story short, by letter dated 21 March 1974 (AB13) the vendor took the stand that the agreement had been repudiated on the ground of the purchaser's refusal to settle the balance sum of RM5,928 towards the purchase price after a reasonable time had been given. The repudiation is challenged by the purchaser on the basis that it was invalid by virtue of the Housing Developers legislation. By paragraph 15 of the amended defence, the vendor also averred that the purchase was based on oral agreement and therefore void by reason of r. 12(1) of the Housing Developers (Control and Licensing) Rules 1970 which provides that every contract of sale "shall be in writing" and shall contain within its terms and conditions provisions as provided in para. (a) to (u) of the sub-rule.

On issues of fact the learned trial Judge mainly found for the vendor. On the extra land dispute, he rejected the purchaser's claim and came to the conclusion that the area of the land sold was 1,834 sq. ft. and not 3,080 sq.ft. and he accepted the vendor's version that the purchase price was RM30,000 comprising RM28,500, the original cost of the property, and RM1,500 as the cost of extra works on the balcony requested by the purchaser. On the evidence we see no reason to disturb the findings of fact made by the learned Judge. On issues of law however, the learned Judge mainly found for the purchaser. On the principal defence that the vendor was entitled to repudiate the contract of sale as a result of the purchaser's failure to settle the balance of the purchase price, the learned Judge held that the sum of RM5,928 demanded was in breach of the provisions of Schedule C of the Housing Developers Rules. It cannot be disputed that the sum demanded included RM3,000 i.e., 10% of the purchase price of RM30,000 which was only payable under para. (h) item 1 of Schedule C:

> On delivery to the purchaser of vacant possession of the housing accommodation and the land as provided in r. 12(1)(o) or on completion of the transfer of the property as provided in r. 12(1)(p) whichever shall first happen.

Since neither of the event stipulated by the Rule had occurred, the sum of RM3,000 was not yet payable and should not be included in the letter of demand. Further, the sum of RM5,928 also included as stated earlier, water deposit amounting to RM120. This sum should also be excluded in the letter of demand as such item was by law payable by the vendor as a licensed housing developer under r. 12(1)(1). Deducting these two items, the amount actually due and payable when the repudiation was made should only be RM2,808 and not RM5,928 as contained in the notice of demand in AB6 dated 18 September 1973; AB11 dated 11 February 1974; and AB13 the letter of repudiation dated 21 March 1974 and confirmed by AB30 dated 30 September 1974 (see pp. 207, 213, 215 and 236 of Appeal Record). The vendor's letter of repudiation (AB13) was in the following terms:

> Dear Sirs,
>
> **Lot 3227/67 Green Park**
>
> We would refer to our letter dated 11 February 1974.

Take Notice that in view of your client's failure to pay the balance of the purchase price the agreement is deemed to have been repudiated by your client. In the circumstances we have been instructed to inform you that the sale has been cancelled by our clients who shall be refunding the sums of money paid by your client. Kindly inform us whether a cheque could be forwarded to you.

On 11 April 1974, the vendor's solicitors also wrote to the Housing Loan Division the following letter:

Dear Sirs,

H.S.(D)353 Lot 3227/67
in the Mukim of Rawang
Encik Rasiah Munusamy

We act for Lim Tan & Sons Sdn. Bhd. and would refer to the above lot which was originally purchased by Encik Rasiah Munusamy to whom you have granted a loan of RM19,192.

Our clients have repudiated the sale for the reason that the purchaser has defaulted in payment of the balance outstanding and due amounting to RM5,928 and desire to pay to you the sum of RM19,192 being the amount advanced by you. Kindly inform us whether it is in order.

In the circumstances, the learned Judge did not err in fact or in law when he held that the purported repudiation by the vendor was improper and not valid. In his submission Mr. Sri Ram argued that the learned Judge had failed to consider Exhibit D7 and D8 at pp. 279 and 280 of Appeal Record. It is his contention that these two documents are complete answer to the alleged breach of the provisions of Schedule C to the Housing Developers Rules. The truth of these two documents were challenged by the purchaser but the learned Judge did not appear to have made any finding as to their reliability. We fail to see why these two documents should not be relied upon. Be that as it may, we do not think that they would validate the purported repudiation of the contract. Exhibit D8 is a letter dated 27 June 1972 informing the purchaser that the vendor had completed the construction of the building and requesting him to complete the purchase; whilst Exhibit D7 another letter dated 4 May 1973 informed the purchaser that the title deed to the property was available and that the vendor was prepared to execute the transfer of the title deed to him on payment of the outstanding amount of RM5,928. Thus the sum of RM5,928 was central to the offer to perform by the vendor, and what is more important when all these letters of demand and repudiation were written between June 1972 and February 1974, there was a dispute between the parties regarding the extra land which was then still not resolved. In our view, this is not a simple case where the purchaser has simply refused to pay the balance of the purchase price. The size of the land sold was in dispute and the balance of the purchase price must necessarily depend on the outcome of the dispute. Although the issue of extra land has now been resolved in favour of the vendor, we do not think that it can be used retrospectively to validate an invalid repudiation of the contract however flimsy the purchaser's claim to the extra land might turn out to be, so long as the claim was genuinely made. What is pertinent is that the building lot in dispute occupied a corner lot and it is not uncommon for a purchaser to assume that there would be extra land. As such on balance it cannot be said that the purchaser simply did not want to complete the contract, and it is fair to assume that he genuinely thought that there was a valid claim on the extra land. In fact after the purported repudiation of the contract by the vendor, the purchaser attempted to make payments of RM4,000 by bank draft (p. 236 of record) and RM808 by cheque and finally on 25 July 1975 he paid under protest a final sum of RM1,120 by cashier's order (see AB31 at p. 237 of record). These payments totalling RM5,928 - the sum demanded by the vendor, are clear

testimony of the purchaser's willingness to perform his part of the contract subject only to the dispute on extra land being resolved. It should be observed that not every refusal to perform some part of a contract will amount to renunciation. Even a deliberate breach will not necessarily entitle the innocent party to treat himself as discharged, since it may sometime be that such a breach can appropriately be sanctioned by damages (see *Suisse Atlantique Societe v. N.V. Rotterdamsche Kolen Centrale*) [1967] 1 AC 361 @ 435). It is not mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract, but there must be an absolute refusal to perform his part of the contract (see *Freeth v. Burr* [1874] LR 9 CP 208 @ 214). If there is an absolute refusal to perform, the other party may treat himself as discharged. Short of an express refusal, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. Where such an inference cannot be drawn, the innocent party will be entitled to claim damages for breach, but not to treat himself as discharged. In particular where there is a genuine dispute as to the construction of a contract, the Courts may be unwilling to hold that an expression of an intention by one party to carry out the contract only in accordance with his own erroneous interpretation of it amounts to a repudiation (see *Chitty on Contracts*, 25th Edn., Vol. 1, para. 1602, p. 884). In this appeal, no evidence was adduced to suggest that the purchaser had by conduct or otherwise expressly or impliedly shown an absolute refusal to settle the balance of the purchase price. There was a genuine dispute regarding the extra land and as adverted to earlier the purchase price albeit in accordance with his own erroneous interpretation that extra land should be included in the sale. In our judgment, in such circumstances the vendor is not entitled to repudiate the contract. Not only was the demand made by the vendor far in excess of what was permitted by law and thereby rendering the failure to comply with such demand blameless, but also the vendor had failed to establish that the purchaser's refusal or unwillingness to perform was absolute. The question whether there was reasonable notice given is not really relevant having regard to the dispute on extra land. There is also no necessity for us to make a ruling on Mr. Palasuntharam's legal proposition that a licensed Housing Developer cannot repudiate an agreement made with a purchaser on account of the latter's default in making payments on due date, and that his remedy is to seek an order of rescission under s. 34(1)(c) of the Specific Relief Act, 1950. All we need say by way of observation is that such a proposition seems to be going a bit too far, as it would mean that every Housing Developer would have to resort to litigation whenever there is default in payment occasioned by the purchaser however absolute might be the purchaser's refusal to pay or to perform any material part of his obligation that goes to the root of the contract.

On the alternative Defence that the oral agreement is not valid under r. 12(1), the learned trial Judge was of the opinion that since only the method or mode of entering into the agreement was in contravention of law, the verbal agreement was valid and enforceable. As we understand him, the form of the contract is not material. It was his judgment that all those provisions as contained in para. (a) to (u) in r. 12(1) should be implied in the oral agreement and both parties were obliged to comply with them. Having interpreted the law in favour of the purchaser, the learned Judge was however not inclined to allow his claim as prayed. Instead the learned Judge came to the following inconclusive finding:

> The next question which I have to determine is whether order can now be made against the defendant to deliver vacant possession and to execute transfer to the plaintiff of the property sold. I do not think that such order can be made in view of the fact that the plaintiff had not made full payment under para. 1(g) of Schedule C. The position now is that the sale and purchase agreement is still subsisting and remains to be fully performed by both parties. Under

para. 2 of Schedule C the defendant is entitled to claim interest on the para. 1(g) balance of RM2,808 for period from 23 January 1973 until date of payment of that balance. The plaintiff would not be entitled to vacant possession or transfer until that balance with interest thereon is settled.

The plaintiff's claim is dismissed.

Having regard to his findings on the law, we are of the view that it should necessarily follow that judgment ought to be given for the purchaser, and that would have entitled the vendor to be appellant before us. In the result we are forced to take the extraordinary course of requiring Mr. Sri Ram for the vendor to address us first both on the appeal and cross-appeal, so that the whole proceedings can be conducted in a more orderly and logical fashion.

On the issue of whether the oral agreement entered into between the parties on 16 December 1971 is valid and enforceable having regard to the requirement of written contract under r. 12(1), we are tempted to agree with Mr. Palasuntharam's submission that having regard to the vendor's letter dated 16 December 1971 (Exhibit D16A); the deposit receipt for RM1,000 also of the same date; and the price of RM28,500 shown in the vendor's brochure (Exhibit AB43 at p. 257 of Appeal Record) pertaining to the sale, the contract was in fact in writing and not oral as pleaded. Mr. Palasuntharam relies on the decision of the Privy Council in *Oversea-Chinese Banking Corporation Ltd. v. Philip Wee Kee Puan* [1984] 2 MLJ 1 in support of his submission that the purchaser can at the appeal stage rely on the written contract although the trial proceeded on the basis of there being an oral agreement. We however agree with Mr. Sri Ram that the *OCBC* case (*ante*) does not assist the purchaser, and to accept Mr. Palasuntharam's submission would contradict the Statement of Claim and render meaningless the purpose of pleading. This is the first time that the purchaser has taken the point that the contract was in writing and no application for amendment of the pleading had ever been made. Throughout the trial the purchaser had denied the existence of the letter Exhibit D16A and insisted that what he had submitted to the Housing Loan Department in his application for loan under item (d), was a photostat copy of his "application to purchase to the vendor" and not Exhibit D16A which is the original letter from the vendor (see Exhibit D16C and Exhibit D16E at pp 300 and 301 of Appeal Record). Further it was argued that since Exhibits D16C and D16E expressly referred to photostat copy, the document could not refer to Exhibit D16A. The learned Judge unfortunately did not make any finding whether the document submitted by the purchaser was D16A as alleged by the vendor or a different document as alleged by the purchaser. In view of the unsatisfactory state of evidence on this particular matter, we do not consider it proper to allow the purchaser to rely on Exhibit D16A to support his eleventh hour proposition of a written contract as a basis of his claim particularly when its very existence had been denied by him throughout the trial, and not admitted as was the position in the *OCBC* case (*ante*). To allow amendment at this late stage would certainly prejudice the vendor and would be contrary to the principle enunciated by the House of Lords in *Wilsons and Clyde Coal Co. Ltd. v. English* [1973] 3 All ER 628.

Going back to the dispute on the validity and enforceability of the oral agreement under the Housing Developers Legislation, the law on this point as a general rule is that although no action can arise from a prohibited and illegal act, if a plaintiff can show that he is a member of the class for whose protection the statutory prohibition was imposed, then as an exception such a person can enforce rights or recover property transferred under the illegal transaction. In *Nash v. Halifax Building Society* [1979] 1 CH 584, a building society advanced money on the security of a property subject to a prior mortgage which was prohibited by s. 32(1) of the English Building Societies Act 1962. It was argued that the Court would not enforce a

contract which was expressly or impliedly prohibited by statute at the suit of either party. It was held that s. 32 was intended to protect the property of a building society for the benefit of all persons interested in the society whether as members or outside creditors; and that therefore although the mortgage transaction was illegal, the society was entitled to recover the money advanced. Similarly, in the present appeal, the oral agreement entered into between the purchaser and the vendor is prohibited by r. 12(1) of the Housing Developers (Control and Licensing) Rules 1970 which requires "every contract of sale shall be in writing", and r. 17 provides penalty to any licensed Housing Developer who contravenes any of the provisions of the 1970 Rules. Now, what is the nature and objective of the Housing Developers legislation? As stated by Sir Garfield Barwick in *Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck* [1981] 1 MLJ 56 @ 60 PC:

> Nothing in the rules expressly purports to invalidate a contract which does not comply with the provisions of the rules. The rules impose no penalties on a purchaser who enters into a contract which does not conform to the requirements of the rules.

In considering the scope of the legislation, Suffian LP in *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] 2 MLJ 31 @ 34 in delivering the judgment of the Federal Court had this to say:

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.

In our judgment although the oral agreement does not comply with the provision of r. 12(1), the purchaser clearly belongs to a class for whose protection the statutory prohibition is imposed and as such the purchaser can enforce his right for specific performance of the oral contract for sale provided he is a *bona fide* purchaser.

On the question of enforceability, Mr. Sri Ram submits that in the instant case the oral contract is unenforceable because the purchaser is not a *bona fide* buyer, and that even if the purchaser is a member of the class of persons for whose benefit the Housing Developers legislation was enacted and that he is entitled at common law to relief, equitable remedy ought to be refused to him by reason of his conduct. The complaint against him is that he has made a false claim regarding the extra land and he has used the Housing Developers legislation as an engine of fraud as enunciated in the case of *James McCormick v. William Grogan* [1869] 4 LR HL 82. It is not a fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud (see *Spry on Equitable Remedies*, 2nd Edn., at p. 236). We have thoroughly examined the alleged unconscionable conduct levelled against the purchaser and also the alleged conduct which was supposed to make him a *mala fide* purchaser and therefore disqualify him from the protection of the Housing Developers legislation. In his oral and as well as written submissions Mr. Sri Ram has tabulated four grounds to establish unconscionable conduct:

(a) it was the purchaser who suggested that there be no written agreement;

(b) the purchaser took advantage of there being no written agreement to make a claim for extra land as having been sold to him;

(c) the purchaser has misled the relevant authorities when obtaining a loan from Bahagian Pinjaman Perumahan (the Housing Loan Division); and

(d) the purchaser tricked the vendor's clerks into accepting three bank drafts and then claiming that the vendor had accepted full payments and wavied any delay.

In normal circumstances, these allegations if unexplained would be sufficient to satisfy us that the purchaser is not a *bona fide* buyer and therefore would render the oral agreement unenforceable. But having regard to the whole evidence and in the light of our conclusion that the learned Judge was correct in holding that the repudiation of the contract is not valid, the impact of these four allegations has been whittled down to the extent that we are satisfied that this is merely a case of the pot calling the kettle black. We are of the view that the vendor is more guilty of the alleged unconscionable conduct assuming for one moment that such conduct is indeed unmeritorious and unconscionable. On allegation (a) that the oral agreement was at the behest of the purchaser, the simple answer to that argument is that the responsibility of having the contract in writing lies on the vendor as licensed housing developer. This is clear from rr. 12(1) and 17. It is for the vendor to insist on the written agreement. The fact that the idea of having no written agreement had originated from the purchaser for whatever reason, does not relieve the vendor from prosecution under r. 17. The legislature has placed on the developer rather than the buyer the responsibility of ensuring compliance with the Rules which *inter alia* includes the requirement of the contract to be in writing failing which the developer is liable to prosecution. In the circumstances, we do not think that ground (a) would make the purchaser a *mala fide* buyer. As regards ground (b),we are of the view that the allegation is unsupported by the evidence. The learned Judge whilst rejecting the claim on extra land quite rightly did not make any finding that the purchaser took advantage of there having been no written agreement to make a claim. As stated earlier, the land in dispute is a corner lot and it is not uncommon in this country that the size of a corner lot is bigger than a middle one. We have dealt with this matter when addressing the issue of repudiation, and we do not wish to add anything further except to state that in any litigation, merely because a plaintiff has failed to establish a particular claim, it does not automatically follow that his claim is made *mala fide* and that all evidence of other claims in the suit must also be rejected outright. Having regard to the corner lot, we do not subscribe to the inference that the claim on extra land was made *mala fide*. With regard to ground (c), it is a fact that the property in dispute has been described by both the vendor and the purchaser as a "double-storey terrace house" although strictly it is in fact a "double-storey shophouse". In our view there can be no sinister motive in the misdescription since the shophouse has dwelling facilities on the top floor. Mr. Sri Ram suggests that the reason for the misdescription was to mislead the Housing Loan Department for otherwise the purchaser's application for loan to purchase a shophouse would not have been approved. But it is clear from the evidence of Cik Hasnah (DW5), the officer attached to the Housing Division of the Treasury, that only purely commercial buildings are excluded from Government loan, but there is nothing to prevent loans being granted to civil servants for purchasing shophouse provided it has residential facility. On the evidence, ground (c) fails to establish that the purchaser is a *mala fide* buyer. Finally, under ground (d) trickery is alleged against the purchaser with regard to the three bank drafts totalling RM5,928 to settle the balance of the purchase price. The learned Judge found that the payments were accepted by the respondent's clerk by mistake. There was no finding of trickery. We see no reason to disturb the finding of fact of the learned Judge. In any event, in view of our finding that the repudiation of the contract was not valid the purchaser was entitled to make the payments and as such both the tender and acceptance were valid.

For the reasons given, we must reject the argument that the purchaser is a *mala fide* buyer. He cannot be deprived of the protection given by the Housing Developers legislation nor is there justification in holding that the purchaser has used the housing developers legislation as an engine of fraud. In our judgment, the purchaser has not perpetrated any fraud - legal or equitable. His claim for specific performance should have been granted.

The contract of sale though oral must be deemed to contain all the provisions in r. 12(1). But notwithstanding the provisions of r. 12(1)(r) and 12(1)(o), we are of the view that the delay in the delivery of vacant possession of the housing accommodation must be attributed entirely to the purchaser's own conduct in agreeing to perform his obligation under the contract only in accordance with his own erroneous interpretation of it pertaining to the extra land. There was no delay by the vendor in the completion of the building although the vendor committed a breach of contract by refusing to accept payment and to transfer the property. This is clear from Exhibit D8 dated 27 June 1972 wherein the purchaser was informed by the vendor that the construction of the building had been completed. In the result the purchaser should not be entitled to any indemnity under r. 12(1)(r). In our judgment the proper discretion to be exercised is to grant the purchaser specific performance of the contract of sale without any compensation under s. 18 of the Specific Relief Act, 1950. This is not a case where damages should also be granted for breach of contract in addition to specific performance in order to satisfy the justice of the case. Before concluding we must confess that from the Appeal Record we are not too happy with the way in which the appellant's case had been conducted in the Court below as regards documentary evidence. Documents like Exhibit D7, D8 and D16A had been unnecessarily challenged and thereby contributing to wastage of judicial time. In the case of Exhibit D16A after strenuous challenge had been made as to its genuineness, ~~attempt is made before us to rely on~~ it to support the purchaser's claim. Be that as it may, this appeal is allowed with costs, and the order of the learned Judge is set aside. The orders as prayed in para. (a), (e), (f) and (g) of the Statement of Claim are ~~granted. The balance of the purchase price of RM5,928 less RM120 must of course be paid~~ by the purchaser to the vendor if this has not been done. In this case we have considered both the appeal and cross-appeal together. For reasons already stated we find the cross-appeal has no merit and should be dismissed. We also order that the deposit be refunded to the appellant.

Also found at [1985] 1 CLJ 541